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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-929

DAVID R. McGEORGE CAR CO., INC.,
Petitioner,

v.

LEYLAND MOTOR SALES, INC.,

—and—

BRITISH LEYLAND MOTORS, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN R. SCHOEMER, JR.
220 East 42nd Street
New York, New York 10017
Attorney for Respondents

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Petitioner, a retail dealer in imported automobiles in Richmond, Virginia, brought this action because Leyland Motor Sales, Inc. ("Leyland")* refused to renew petitioner's two-year Triumph dealership contract on expiration in July 1970. The primary claim was a violation of the Automobile Dealer Day in Court Act, 15 U. S. C. § 1221-25, but other claims under the antitrust laws and the Robinson-Patman Act were joined.

*British Leyland Motors, Inc., Leyland's parent, is incorrectly named as a respondent. The action against it was dismissed (1a [in Appendix to Petition]).

In the District Court, the petitioner prevailed on (a) its claim under the Robinson-Patman Act, and (b) a claim that it had been "shorted" in the number of Triumphs made available to it during the last two years of its dealership. Its other damage claims, derived from the fact of non-renewal, were rejected. In the Court of Appeals, Leyland did not dispute the determination under (b) but appealed from the judgment for damages under the Robinson-Patman Act. Petitioner cross-appealed on its rejected claims.

The Court of Appeals unanimously reversed the District Court on the Robinson-Patman damages, and upheld it on the other issues, except that it reduced the damages awarded for "shorting" petitioner in the number of Triumphs supplied. A rehearing in banc was denied.

Statement of the Case

While the petition presents the Questions contentiously, more as a summary of petitioner's arguments than as a statement of the issues decided, it sufficiently identifies those issues for these purposes.

David R. McGeorge Car Co., Inc. was a dealer in imported automobiles. In the years 1963-1970, one of the lines it carried was Triumph manufactured in the United Kingdom and distributed here by Leyland. By 1969, Triumph was the smallest of the three lines carried by McGeorge, which in that year sold 119 Mercedes-Benzes, 246 Toyotas and 77 Triumphs (8a, n. 13).

As a result of the 1967 merger in the United Kingdom of the Triumph and Rover manufacturing companies, Leyland undertook the marketing of the Rover luxury sedan in the United States. Rover was not selling well (in 1971 it was withdrawn from the U. S. market), and Leyland tried to rescue it by marketing it through the

Triumph sales organization (15a). Triumph dealers were asked to take on Rover as an added line. Some did; some, including McGeorge, did not. While the addition of Rover would have involved purchasing only one or two cars, a sign, and a few hundred dollars worth of special tools, David McGeorge was concerned about the effect this would have on his principal supplier, Mercedes-Benz, which he was afraid would cancel him if he took on the Rover line (15a).

On the expiration of the Triumph dealership contract in July 1970, Leyland moved the Triumph line to another Richmond dealer who agreed to handle Rover as well. David R. McGeorge seemingly acquiesced in this, but died two months later, and his son, who took over the business, began this lawsuit the following year.

The Decisions Below

The District Court rejected McGeorge's primary claim for damages for non-renewal of the franchise under the Dealer Act, holding that the Act did not compel Leyland to keep McGeorge indefinitely as its Richmond Triumph dealer, and that the refusal to renew was a "rational business decision" not characterized by an absence of "good faith" under the Dealer Act (33a). The Court of Appeals agreed that Leyland "had a perfectly legitimate reason not to renew its Triumph franchise" and such decision was "based on sound business considerations free from the 'coercion and intimidation' proscribed by the Act" (7a). Moreover, as the Court observed (8a, n. 13), Toyota was pressing McGeorge to drop Triumph, and this "played a significant part in Leyland's decision to seek another dealer who could guarantee more permanency".

The District Court found that some of the cars McGeorge would normally have received in 1969-70 were

withheld during a time of scarcity because McGeorge would not add the Rover line. Leyland did not dispute this determination, and the Court of Appeals affirmed, although it upheld Leyland's claim that the damages awarded were excessive because of miscalculation by the District Court of the number of cars to which McGeorge was rightfully entitled.

Both the District Court and the Court of Appeals *rejected* McGeorge's claim under the antitrust laws that Leyland had unlawfully sought to tie the sale of Rovers to the more successful Triumph model.

Plaintiff's last claim was that Leyland had discriminatorily withheld the service of "delivery" as to the cars involved in the shortage, thus violating the Robinson-Patman Act. The District Court upheld this claim, originally under the misapprehension that only single damages were recoverable, and these were duplicative of the damages allowed under the Dealer Act, but the Court later corrected its error and trebled the damages (31a). The Court of Appeals reversed the District Court on this issue, by distinguishing (instead of rejecting) a Seventh Circuit decision on which the lower court had relied.

Question 1

THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE DEALER ACT ISSUE

The courts below recognized that plaintiff's claim under the Dealer Act for non-renewal, if accepted, would grant permanent tenure to McGeorge as a Triumph dealer in Richmond, and would leave Leyland helpless to remove the Triumph line from its weak and vulnerable position at the McGeorge dealership to a more promising sales outlet. The Court of Appeals agreed with the District Court that the

Act did not compel such an absurd result and that Leyland was free to move the line elsewhere because of "sound business considerations free from the 'coercion and intimidation' proscribed by the Act" (7a).

Petitioner perceives in this a "direct conflict" with earlier decisions of the Second and Tenth Circuits, as well as an unwarranted and illegal extension of the defense of good faith that Congress made available under the Act. Neither contention has any validity.

1. Both the Second Circuit in *Autowest, Inc.* v. *Peugeot, Inc.*, 434 F. 2d 550 (1970), and the Tenth Circuit in *American Motors Sales Corp.* v. *Semke*, 384 F. 2d 192 (1967),* were confronted with jury verdicts resolving questions of good faith under the Act in the dealer's favor. In *Autowest* the jury found that the distributor had been terminated for its refusal to adhere to the manufacturer's suggested resale prices; in *Semke*, the jury found that the dealer had justifiably terminated his dealership because of (a) refusal to approve the dealer's warranty claims and (b) unlawful pressure from the manufacturer to "package" his purchases, *i.e.*, to accept less desirable models as the price of having an order filled for the models then in demand. Both courts held there was sufficient evidence of coercion and intimidation to support the verdict for the plaintiff. This case, by way of distinction, involved not a termination, but a fulfillment of the contract term, followed by a transfer of the dual lines to another dealer not disabled from accepting them by his commitments to other suppliers, as McGeorge was to Mercedes-Benz.

Petitioner finds a conflict with the Second Circuit's condemnation of manufacturer-oriented clauses requiring a dealer to take "a large stock of cars". This is not so. There

*Both cases were cited by the Court of Appeals (5a-6a), with no apparent awareness of any conflict with its own decision.

is a wide difference between trying to overload a dealer, to foster the manufacturer's sales, and asking him to take on an extra line which was not separately viable. Both the District Court and the Court of Appeals fully appreciated this; it seems clear that neither the Second nor the Tenth Circuit would have viewed the case any differently.

2. Petitioner is greatly offended by the willingness of the Court of Appeals to accept a good-faith defense of marketing necessity. But as the Court noted, with ample citation of authority, the Act does not create an indissoluble bond between automobile manufacturer and dealer (7a). There is no discernible difference between those cases upholding the right of the manufacturer to terminate or refuse to renew a dealership and the present one where "Leyland acted in the reasonable belief that its business welfare required a dual dealership arrangement" (8a).

3. Petitioner urges this Court to issue a "definitive" decision construing the Dealer Act. But it fails to show that the Courts of Appeals have been uncertain about the construction of the Act or have arrived at irreconcilable positions. The Act is, after all, simply a good-faith statute, where the trier of the fact, jury or court, must decide whether the manufacturer's action was in good faith, or whether it was characterized by the coercion or intimidation that is bad faith.

Question 2

THE REVERSAL OF THE ROBINSON-PATMAN CLAIM WAS NOT BASED ON FACTS SUBSTITUTED BY THE COURT OF APPEALS

Because petitioner cannot show any conflict between circuits as to the disposition of its claim under § 2(e) of the Robinson-Patman Act, it instead attacks the decision

below as involving an unwarranted "substitution" of factual findings for those of the District Court. Such an issue is not worthy of the attention of this Court.

Petitioner concedes that, while the Fourth Circuit indicated "some disagreement" with the Seventh Circuit holding in *Centex-Winston Corp.* v. *Edward Hines Lumber Co.*, 447 F. 2d 585, *cert. den.* 405 U. S. 921 (1972), it distinguished the case, and did not refuse to follow it.* The Seventh Circuit had held (on demurrer) that a claim of consistently late deliveries in violation of contract, while competitors were favored with prompt deliveries, could constitute a § 2(e) violation.

Petitioner appears to argue that the Court of Appeals was forced into a *Centex-Winston* confrontation because of the District Court's remark that a "major service" in Leyland's distribution functions was "delivery of cars from the docks upon import" (21a). Petitioner (p. 13) somehow transmutes this into a finding that "trade custom and usage" called for Leyland to make agreed upon deliveries to its buyers. There was no such finding; but it was not necessary for the Court of Appeals to question the basis for the District Court's remark. It focused instead on the contract between the parties, which the Court found "required McGeorge to accept delivery of Triumphs at their point of arrival in Baltimore or engage independent transporters at its own risk" (4a). It was justified in relying on these contract provisions. See *Emor, Inc.* v. *Cyprus Mines Corp.*, 467 F. 2d 770, 773 (3d Cir. 1972).

Leyland pointed out below, and it will bear repeating, that if McGeorge is allowed a Robinson-Patman recovery on this theory, the federal courts could expect a wave of

*The case cited by petitioner as indicative of District Court refusal within the Fourth Circuit to follow *Centex-Winston* is from the Middle District of Tennessee, in the Sixth Circuit.

§ 2(d) and (e) claims from every unhappy buyer claiming a breach of a supply contract.

Question 3

THE COURT OF APPEALS PROPERLY CORRECTED THE DISTRICT COURT'S ERROR IN COMPUTING DAMAGES

It is surprising that petitioner would seriously propose this as a point for review in this Court.

The District Court made an obvious error in counting the number of cars on which McGeorge was "shorted", and which were used to compute McGeorge's damages under the Dealer Act. Leyland pointed out to the Court of Appeals that in effect the District Court had counted the same cars twice. The Court agreed, and reduced the number of cars, although leaving untouched the unit lost-profit figure (11a-12a).

Petitioner complains that Leyland never raised the point in the District Court. This is mystifying. It is not explained how Leyland was supposed to anticipate the District Court's error. And in asserting it never had a chance to respond to Leyland's argument in the Court of Appeals, petitioner has obviously forgotten pp. 36-37 of its main brief below, where its response was set forth.

Question 4

THE COURT OF APPEALS CORRECTLY HELD THAT LEYLAND'S REFUSAL TO RENEW PETITIONER WAS NOT PURSUANT TO AN UNLAWFUL TIE-IN ARRANGEMENT

Petitioner lastly argues that review is warranted in this case because the Court of Appeals, in rejecting its § 1 Sherman Act and § 3 Clayton Act tie-in claims, failed to evaluate respondent's conduct by the standards of *per se*

liability established in *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594 (1953), and *Fortner Enterprises* v. *United States Steel Corp.*, 394 U. S. 495 (1969).

This ignores the minimum conditions that a tie-in claim must meet in order to bring the *per se* rules into effect. *Fortner* (394 U. S. at 500) teaches that "the controlling consideration" is whether the total amount of business foreclosed to competitors is "substantial enough in terms of dollar volume so as not to be merely *de minimis*." Both courts below answered this threshold question adversely to petitioner's contention. While petitioner now gives the fanciful figure of $40 million (it was $16 million in the Court of Appeals), it not only fails to cite any record support for that claim, but omits to note that the District Court had found a failure of proof as to the number of tied products outside Virginia, where only about two dozen Rovers were tied to Triumph over a two-year period (33a). As their value was well below the figure mentioned in *Fortner* and elsewhere, the District Court observed that the alleged tie-in was "both in effect and scope *de minimis*" (33a). Another factor noted by the Court was that the scheme failed, showing a lack of market power on Leyland's part as to both the tying and the tied product.

Thus the record effectively blocks petitioner's claim that the arrangement was *per se* unlawful, rendering it necessary to consider whether Rover's competitors were excluded from the market. Presumably the need to prove that the arrangement was not so small as to preclude any competitive impact is one of the reasons underlying the *de minimis* rule. As the Court of Appeals noted, "Leyland's conduct did not impede or tend to impede competition between Rover and the other cars in its style and price range" (11a). And the circumstance that McGeorge was already under the constraints effected by his existing commitments to Mercedes-

Benz was another reason why his claim against Leyland was absurd on its face.

In *White Motor Co.* v. *United States*, 372 U. S. 253 (1963), this Court noted "the importance of the nature of the tying arrangement in its factual setting" and quoted its earlier language in *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 330 (1962), tolerating the use of the tying device "by a small company in an attempt to break into a market." Therein lies the story of this case.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN R. SCHOEMER, JR.
220 East 42nd Street
New York, New York 10017
Attorney for Respondents